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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 VINCENT M. FAZZARI,

4 Plaintiff,

5 v.

14 Civ. 6549 (NRB)

6 COHEN PONTANI LIEBERMAN
7 & PAVANE LLP, et al.,

8 Defendants.

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9 New York, N.Y.
10 February 25, 2016
3:30 p.m.

11 Before:

12 HON. NAOMI REICE BUCHWALD

13 District Judge

14 APPEARANCES

15 FRUMKIN & HUNTER LLP
Attorneys for Plaintiff

16 BY: WILLIAM FRUMKIN
ELIZABETH HUNTER

17 ABRAMS GORELICK FRIEDMAN & JACOBSON LLP
18 Attorneys for Defendants except Cozen O'Connner
19 BY: STEVEN BERLIN

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(Case called)

(In open court)

MR. FRUMKIN: William Frumkin, Frumkin & Hunter, for the plaintiff Vincent Fazzari.

MS. HUNTER: And Elizabeth Hunter from Frumkin & Hunter.

MR. BERLIN: Steve Berlin from Abrams Gorelick Friedman & Jacobson, on behalf of all defendants but Cozen & O'Conner.

THE COURT: All right. Just for the record, I gather that the reason that there is no lawyer here from Cozen & O'Conner is because when my law clerk asked Mr. Frumkin to call counsel about this meeting, Mr. Frumkin didn't remember to call the Cozen & O'Conner lawyer; is that correct?

MR. FRUMKIN: Your Honor, I asked my assistant to. I thought she had. But we been having a lot of issues just with CPLP defendants, and maybe she thought that they weren't, because I didn't know they weren't called until we arrived here today when they didn't appear. So, I apologize to the court; I do take responsibility.

THE COURT: All right. Well, I mean obviously normally it's customary to have everybody present, but certainly Mr. Frumkin is correct that I think that the disputes in the letters do not involve directly the Cozen & O'Conner firm, and fortunately we have decided because of the amount of

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1 back-and-forth to have a court reporter, so there is a full
2 record of this hearing, and the lawyers from Cozen & O'Connor
3 can certainly read what happened.

4 MR. BERLIN: May I?

5 THE COURT: Sure.

6 MR. BERLIN: While I can't speak for the lawyers for
7 Cozen & O'Connor, and since we are all ready, I would prefer
8 that we proceed today, but they may in fact have an interest in
9 some of the issues that we discussed today involving our
10 request for a protective order.

11 THE COURT: Well, I honestly don't know from the
12 letters exactly what you're fighting about at this point. Some
13 things are not spelled out, and some disputes may -- I'm
14 keeping my fingers crossed -- have disappeared between the time
15 the letters were written and today.

16 And let me certainly say that it was never the court's
17 intention that Cozen & O'Conner not be present today. We even
18 did make a call to counsel for Cozen & O'Conner and learned
19 that he was in a deposition. Had he not been, I would have had
20 him on the bench phone, and he could have heard as much as he
21 could have heard, and certainly have had a chance to contribute
22 to the conversation. But that was not a possible alternative
23 since he was at this deposition.

24 All right. That preliminary matter having been
25 resolved as kind of best we can under the circumstances, let me

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1 just put to rest one of the disputes which is the one that I am
2 most, in a sense most directly involved in, and that is the
3 application for reconsideration of my January 7 letter. Let me
4 just state this clearly for the record.

5 The court adheres to its earlier determination that
6 documentation concerning a suit commenced in 2004 and asserting
7 claims of sex discrimination is not discoverable in this action
8 commenced ten years later and involving a claim of age
9 discrimination.

10 The court has specifically reviewed not only
11 plaintiff's letter of January 21 and February 5 but also Judge
12 Wood's opinion in the Collins case from 2008. Nothing in these
13 documents supports the requested discovery.

14 One further comment is in order. Counsel are
15 presumably well aware of the preference in the federal and
16 local rules for informal resolution of discovery disputes.
17 Therefore, in this court's view it's incumbent upon counsel to
18 respond to a substantive letter from an opponent, lest what
19 happened here happen again, that the court resolves the issue
20 without receiving such a response on the assumption that none
21 was forthcoming.

22 Many times my chambers does reach out to counsel to
23 ask if they intend to submit a response, but I think in any
24 circumstance where a letter is substantive, it's advisable for
25 counsel to call and say the letter is forthcoming, if they

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1 intend to put one in, as I say, lest what happened here repeat
2 itself. It's not the result I would normally like. I would
3 have had no trouble having greater discussion on the issue.

4 So, let's move on to the other matters that are
5 apparently in dispute. Let me just first ask for clarification
6 as to whether there remains any dispute about plaintiff's
7 discovery requests that go back I guess maybe as far back as
8 April, and which were sort of the subject of letters addressed
9 to me on February 1 and February 4 where Mr. Berlin represented
10 that he was prepared to -- actually I'll just read it.

11 "I have done so" -- which is to review the earlier
12 matters, I think -- "and the CPLP defendants will provide a
13 response to those 56 additional document requests." And it
14 goes on to say, "Accordingly, contrary to plaintiff's argument,
15 there currently is and never was a discovery dispute on this
16 issue."

17 So that letter was written on February 4. It is now
18 February 25, literally three weeks later. Has production been
19 made? Is plaintiff satisfied with the production that was
20 made?

21 MR. BERLIN: The production of these additional 56
22 requests has -- the bulk of the documents that have already
23 been produced are also responsive to those 56 requests, but I
24 haven't yet submitted a written response indicating which
25 documents are responsive. We are working on it; we are almost

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1 done. But in between that letter and now we had a lot of other
2 work to do in this case and have done it. As I advised
3 plaintiff's lawyer, we are almost finished.

4 But there is no dispute in the sense that while there
5 was a misunderstanding as to whether I had to go back and
6 respond to those, there is no misunderstanding, and I agree
7 with Mr. Frumkin that we should respond to those, and so we're
8 almost finished.

9 THE COURT: Apart from the fact that I'm sure he is
10 disappointed and I'm disappointed that still we haven't closed
11 the loop, I guess, on this, are there any of the requests that
12 you object to that are going to present issues? Or is it just
13 that you haven't completed the written response but you've
14 produced all the documents? I'm not sure.

15 MR. BERLIN: It's the latter. It's the latter, your
16 Honor. There may be less than a handful of additional
17 documents not produced because we had already done the search
18 and identified all the documents responsive to the revised
19 requests when this issue came up, and so we did a subsequent
20 search to identify all the documents responsive to these
21 requests. And all but a handful have been produced already and
22 it's just the written responses that remains.

23 MR. FRUMKIN: Your Honor, that's not -- my
24 understanding was that we had received responses that indicated
25 there were objections, but that in 56 of the responses that

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1 documents were going to be produced. The revised requests that
2 we put in our letter were not the 56, they were other requests.

3 So, when Mr. Berlin has told us he is working on the
4 56, obviously when we get them we would see what we have and
5 what we don't have and then address it then.

6 I was not under the impression that the revised
7 requests were part of the 56, but I wouldn't even be in a
8 position to say whether they are or they're not until I receive
9 them, which we have not received.

10 MR. BERLIN: I think I can clarify.

11 THE COURT: Both 56 to start and 56 the second time?

12 MR. FRUMKIN: No, there were about eight or nine that
13 were pared down and revised in our letter. Mr. Berlin
14 initially thought that was all we were asking for. But we
15 didn't respond to the others because we were already told we
16 were getting them. So, we have not received the responses,
17 objections or documents in relation to the 56.

18 So, I'm somewhat confused if the 56 are now covered by
19 the others -- which I don't think they were -- but what I'm
20 ultimately telling the court is that until I receive objections
21 or responses -- or we receive -- and documents, we wouldn't be
22 in a position to know what we received and what we didn't
23 receive. So we're still out -- the jury is out on that one, I
24 guess.

25 MR. BERLIN: I will try to explain. I'm not going to

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1 go into the history of how we got to this issue.

2 THE COURT: Please, I really would appreciate that.
3 Don't.

4 MR. BERLIN: I'm not. But once we got there, and I
5 agreed, of the 87 or 88 original document requests, there were
6 56 which our original -- this is before we had the ESI
7 search -- 56 which we posed lots of objections but said we
8 would produce documents subject to those objections pursuant to
9 a search. And that was in our initial response.

10 So when I ultimately agreed with Mr. Frumkin that I
11 should go back and respond to those requests as well, we did
12 internally do a search to identify documents from the hits that
13 we got from our original ESI search to find documents
14 responsive to these 56 requests.

15 Most of the documents identified were already produced
16 in response to the revised document requests. They cover a lot
17 of the same turf, do most of the documents that we have
18 identified as responsive to these 56 requests have already been
19 produced, and there is about a handful more that will be part
20 of a supplemental production which hopefully I'll finish next
21 week when I complete the written response to these 56 requests.
22 And I believe I explained that to Ms. Hunter but it may not
23 have been clear.

24 THE COURT: OK. But the question that I still have
25 is: Should Mr. Frumkin expect, or should I expect, that there

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1 are documents that exist that you're withholding on some
2 ground?

3 MR. BERLIN: No.

4 THE COURT: No? OK. So regardless of the sort of
5 good lawyering preamble that says "subject to the following
6 objections, we will produce responsive documents," the preamble
7 is as a practical matter irrelevant. You are producing
8 whatever you have that they asked for. Yes? No? Except for
9 what I've already ruled on.

10 MR. BERLIN: I believe that's correct. And I may find
11 out that I'm incorrect on one or two documents or a handful,
12 but I don't think so, because I have already been through part
13 of this already, and I believe that's correct.

14 MR. FRUMKIN: Your Honor, from what we received it
15 seems like not everything was produced, but I don't want to
16 waste your time now without knowing.

17 THE COURT: Well, I also don't want to keep doing
18 this.

19 MR. FRUMKIN: Understood.

20 THE COURT: And that doesn't mean I'm sending you to a
21 magistrate. I'm not doing that. But I would like to use this
22 meeting with the court reporter to nail down whatever it is
23 that we can nail down. So what is it that you, Mr. Frumkin,
24 believe exists or should exist and that is responsive to
25 document requests you have served but that you haven't

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1 received?

2 MR. FRUMKIN: Your Honor, I have to be totally open
3 with the court, I am not prepared to address that today for the
4 simple reason that Mr. Berlin indicated to me that in the
5 e-mail that came with the documents I believe on February 12
6 that we would be receiving them as soon as possible. And we
7 haven't received them.

8 So, I haven't -- I did a cursory -- we did a cursory
9 review of what we did receive, and a lot of it did not
10 necessarily seem responsive to the requests that we made.

11 The categories here are billing issues amongst all the
12 attorneys, bringing in business issues. You know, there are a
13 lot of documents that were missing which was going to be the
14 30(b)(6) issue about what was retained and what wasn't
15 retained, what firm did what in terms of whose decision making
16 it was to have these lawyers go from one firm to the other.
17 The Cozen people seemed to think that it was all CPLP, and some
18 of that we're hoping to ferret through the documents.

19 So, unfortunately I can't really answer your question
20 because I didn't take the time to prepare that, because I knew
21 I was getting more information, and I thought I was doing the
22 court a favor until we had it all, and then we were in a
23 position to speak to Mr. Berlin, try to work that out, and then
24 if we had to come to the court.

25 In addition, your Honor, there is supposed to be

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1 revised interrogatory responses, which we also requested in our
2 same letter, that haven't been responded to either.

3 So, it was my feeling -- and again if the court
4 doesn't agree -- that we should get the whole pie, look at it
5 and then see what we have and what we don't have, try to work
6 it out and then go from there.

7 THE COURT: Well, look, I obviously want you to try to
8 work it out; no judge would want anything else. I just took
9 from your comment here that you had concluded that there were
10 obvious gaps to you in the production that you had received,
11 and I was going to try to tease that out to see if we could
12 talk about it. But I gather you're not in a position to tell
13 me what it is that you think is obviously missing.

14 MR. FRUMKIN: I couldn't say, your Honor, because it
15 might be coming. You know, it might be referenced as something
16 else that we receive. Like I said, we don't have the complete
17 production, and based on my experience, I didn't know that your
18 Honor was going to go into it without us having it. If I had
19 it and went through it and consulted with counsel, then we
20 would certainly be prepared to do that.

21 THE COURT: Well, can we get, Mr. Berlin -- because
22 just as plaintiff's counsel and plaintiff probably has gotten a
23 little frustrated, so have I -- when are we going to bring this
24 initial phase of document requests and interrogatory answers to
25 a total end? I mean at least an end from the perspective of

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1 the Cohen Pontani production. I wouldn't be shocked to hear
2 that we'll have some battles afterwards, but at least when is
3 this going to absolutely come to an end? It's too long; it's
4 too slow.

5 MR. BERLIN: My intention is to complete it -- and I'm
6 close to done -- complete what I need to do. It's just not the
7 only thing I have to do, but I understand that's not your
8 Honor's problem.

9 THE COURT: Well, we understand the issue.

10 MR. BERLIN: But to complete it by next week, to be
11 completed, but it's conceivable it might be the week after, and
12 then I will be completely done.

13 THE COURT: I will give you until March 7, that's it.
14 Get it done.

15 MR. BERLIN: Thank you, your Honor.

16 THE COURT: You are just going to have to make this
17 more of a priority.

18 OK. There seems to be -- although this is based on
19 letters I have in front of me. I didn't know what the dispute
20 is. What is the 30(b)(6) dispute?

21 MR. BERLIN: If I may, since I raised it. I imagine
22 at your suggestion at the November 3 conference, plaintiffs
23 eventually served the 30(b)(6) notice. The list of items that
24 they asked that the individual representative of CPLP testify
25 about seemed inappropriate to me in certain respects, and we

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1 served them with objections.

2 We had a conversation with an attempt to resolve those
3 objections and see if we can come to some agreement as to the
4 specific scope of the testimony that the representative would
5 have to give. We could not resolve it, and so we appropriately
6 asked for a premotion conference on protective order. We
7 didn't submit more documentation than we did, because we were
8 waiting to hear from the court to find out what you wanted in
9 terms of the submission. But I do have --

10 THE COURT: Do you have a copy of --

11 MR. BERLIN: I have a copy of the notice and our
12 objections.

13 THE COURT: OK. If I could see that.

14 OK. I think it's pretty clear that I'm not in favor
15 of discovery going back to 2003. I don't see any reason that
16 the relevant period that I've set should not apply to the
17 30(b)(6) witness.

18 MR. FRUMKIN: Your Honor, just to explain, we
19 understand that fully in terms of, you know, what might be
20 relevant to the case, but we don't know when these systems of
21 how documents are kept were set up. I mean that could have
22 happened 20 years ago; we really just don't know. And what we
23 wanted to do was examine the witness and find out when these
24 systems went into place.

25 I think the fact that the information relevant to the

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1 case may be five years before Mr. Fazzari was not retained in
2 this position. But when the systems were set up and how
3 document are maintained, you know, that could have been from 20
4 years ago. I don't really know what it is.

5 So, what we said to Mr. Berlin was, you know, let us
6 ask your witness about that, and if it turns out that it's
7 irrelevant, it's irrelevant. But it's not the same issue in
8 terms of how documents are stored and when those procedures
9 went into place that don't exist now because of this alleged
10 Sandy thing being the same timeframe for relevance to this case
11 in terms of proving discrimination. We are talking about where
12 documents are and what happened to them, not whether our client
13 was discriminated against and whether the comparators, etc. or
14 issues that arose in the case are relevant to that.

15 THE COURT: No one -- I don't think anyone is
16 suggesting that you can't ask a question along the following
17 lines: What was the system utilized to maintain records
18 between July 1, 2006 and July 1, 2011? Where were those
19 records maintained? Who was in charge of them? What
20 difference does it make whether that system that was in place
21 then was set up 20 years earlier? Who cares?

22 MR. FRUMKIN: I don't know, your Honor. I don't know
23 how the questions are going to be asked. Personally my feeling
24 was to limit the timeframe --

25 THE COURT: Let's say they had documents from 2003

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1 that were kept in one location and the documents from 2006 were
2 kept someplace else, and the documents from 2006 took a hit
3 from Hurricane Sandy but the documents from 2003 that were
4 stored someplace else didn't take a hit. You're still not
5 getting the 2003 documents. Who cares where they are?

6 MR. FRUMKIN: I understand, your Honor, but again this
7 is discovery. My argument to you is this is discovery, it's
8 broad. We just wanted to know how the records were kept. I
9 don't want to run into a problem and be back here again
10 because --

11 THE COURT: Well, but what is the problem? What can
12 the problem possibly be? I mean every time you ask for more
13 than you should get, all it does is lead to another dispute
14 which slows down your case, which is something that you the
15 plaintiff do not want.

16 MR. FRUMKIN: I agree, your Honor.

17 THE COURT: So you have to zero in on what you need
18 and not give the defendant a chance to object, because every
19 time they get a chance to object they slow down the case to
20 their advantage, not to your advantage. I mean it's just not
21 the best approach.

22 MR. FRUMKIN: Your Honor, I think the point is we
23 didn't want to be restricted in trying to find out where the
24 relevant documents are, what happened to them, how they were
25 maintained.

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1 THE COURT: Then don't ask about irrelevant documents.

2 MR. FRUMKIN: Well, it just seemed to me that to have
3 a time limitation on how they were maintained -- and they might
4 say I don't have to answer that question because that system
5 went into place in 2000 and that's not relevant -- to where the
6 documents are now, I just don't know, your Honor. It just
7 seemed to me to be somewhat of an obstructionist position to
8 take, and that's why we couldn't agree on it.

9 THE COURT: Well --

10 MR. FRUMKIN: Obviously we're not asking for documents
11 from 2003.

12 THE COURT: If the 30(b)(6) witness raised an
13 objection like that and didn't answer the questions about the
14 information retention system in place during the relevant time
15 period, I suspect you would probably call my chambers, and I
16 would resolve that swiftly.

17 MR. FRUMKIN: Your Honor, it was our understanding of
18 the process here that the purpose of the schedule that
19 accompanies the 30(b)(6) is to deal with the subject matter
20 that we'd like a witness to be aware of, so when we get to the
21 deposition then we ask the questions. If the problems come up
22 and it's either outside of the timeframe --

23 THE COURT: But you have no right to have a witness
24 prepared on information that's irrelevant. That's the bottom
25 line.

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1 MR. FRUMKIN: Well, your Honor, like I said, I didn't
2 think that the timeframe relevant to obtaining evidence to
3 prove the case is the same issue as how documents are
4 maintained and when documents are maintained.

5 THE COURT: Well, you curiously picked 2003, which
6 happens to be the year that Ms. Collins was fired, so I
7 certainly understand why the defendant had a negative reaction
8 to that in light of the other disputes. So that I think takes
9 care of the first.

10 And like 5, what would be the relevance of even asking
11 about categories of documents related to the purchase of
12 pencils, which is included in that? Those would be
13 administrative documents. Supplies for the firm? Why?

14 MS. HUNTER: Your Honor, you're right, I don't think
15 we want to know about supplies that were purchased. I think
16 our concept of administrative was, you know, probably more
17 along the lines of, you know, how the firm is run, who makes
18 decisions about handling out case assignments or, you know,
19 matters of bringing in business. I agree with you, I don't
20 think we were looking to know about pencils.

21 And, certainly, if we ask that question what types of
22 documents are kept at the firm, and he would say one type of
23 document is about purchasing and supplies, that would not be a
24 category we would continue to pursue through the deposition; we
25 would move on to more relevant categories.

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1 I mean this was just obviously our notice with the
2 types of topics we might want to cover at the deposition, to
3 give them notice of what type of person they should designate
4 for the deposition. You know, it's not a precise listing of
5 the questions we're going to ask.

6 MR. BERLIN: Your Honor, if I may.

7 THE COURT: Yes.

8 MR. BERLIN: What Ms. Hunter said is precisely the
9 problem with this. Unlike a regular deposition where
10 Mr. Lieberman who is designated might be deposed as a fact
11 witness, and they want to explore the extent and scope of his
12 knowledge, this is a 30(b)(6) where he was asked to prepare
13 himself with knowledge that the entity has on particular
14 topics, and, you know, generally speaking, these kinds of
15 requests need to be with particularity. So, for instance, an
16 open ended request for administrative documents including but
17 not limited to, leaves it up to us to figure out what they are
18 thinking about.

19 As this colloquy just indicates, your Honor thought it
20 could include something as literal as pencils, and Ms. Hunter
21 says, no, we really didn't mean that. But the way it's
22 written, it's up to me to guess.

23 But really what is important I think -- because all
24 the requests are basically seeking to identify -- the purpose
25 of this 30(b)(6) is to identify documents that exist that they

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1 might still be able to seek discovery of, or to find out
2 documents no longer exist. And I think that's the purpose, but
3 they should indicate what documents they need to know about at
4 this point.

5 THE COURT: Look, let's go back. Refresh me. Because
6 of Hurricane Sandy what happened?

7 MR. BERLIN: It's not exclusively because of Hurricane
8 Sandy. We have two sets of documents, hard copy and
9 electronic. Certain hard copy documents were brought over to
10 Cozen O'Connor when the individuals joined Cozen O'Connor. And
11 the firm had a great deal of documents in a storage facility --
12 hard copy documents -- not only case files -- but hard copy
13 documents in a storage facility in Oceanside, New York. That
14 facility was flooded during Hurricane Sandy, and a significant
15 amount of the files were wet and destroyed. Several other of
16 the files have subsequently been destroyed at the direction of
17 the CPLP because they didn't want to incur the storage costs
18 anymore, and they were case files they didn't need.

19 So there are two sets of -- initially I was under the
20 impression they had all been destroyed by Sandy, but as you
21 recall last time we were here I corrected that.

22 THE COURT: OK.

23 MR. BERLIN: So, and then there were the electronic
24 files, and there were 14 servers which were brought over to
25 Cozen O'Connor. I don't know what they did with them all.

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1 They may have imported some stuff and not other stuff. But the
2 14 servers were in the storage room, and now those 14 servers
3 are held by my ESI vendor.

4 In addition, in preparation for the 30(b)(6) -- and I
5 might as well disclose it, just to make it clear -- there was
6 another server that had administrative files, and that was kept
7 in the home of the office manager and destroyed in Sandy. She
8 lived in Long Beach, New York.

9 So, I think the purpose of this 30(b)(6) was to find
10 out what we had, where it might be, what exists and what
11 doesn't exist -- that's my understanding -- but not with regard
12 to anything in the universe but with regard to things that they
13 might need to know about for purposes of the case.

14 THE COURT: OK.

15 MR. BERLIN: And when we last talked about this is
16 when you suggested why don't you take a 30(b)(6) and find out
17 exactly what happened. So I assume that's how this happened.

18 THE COURT: So then the focus of the 30(b)(6) is
19 not --

20 MR. BERLIN: May I interrupt?

21 THE COURT: Sure.

22 MR. BERLIN: I know Ms. Hunter said they're concerned
23 with how the firm ran, how it was operated. None of that is in
24 this notice. So until I got here, until she said that before,
25 I never understood that that would be the focus of the

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1 30(b)(6) .

2 THE COURT: Because, in other words, that's may be
3 sort of what I'm trying to articulate. I'm having a little
4 trouble with it. But there is a difference between a 30(b)(6)
5 deposition -- which is what I think I contemplated -- which was
6 designed to learn what records are still in existence and what
7 records were destroyed and how, versus a 30(b)(6) deposition
8 which is actually designed to get substantive information.
9 This is not a 30(b)(6) to get substantive information. And I
10 think that maybe what Mr. Berlin was just sort of getting at is
11 Ms. Hunter's answer to my question sounded like I want to be
12 able to ask this witness how did you kind of operate this firm.

13 This is much more like a records custodian. This
14 could be -- I don't know. Maybe, Mr. Berlin, I know you
15 identified somebody who is going to be the 30(b)(6) witness.
16 His name is Lance something?

17 MR. BERLIN: Lance Lieberman. He is one of the
18 individual defendants, Lance Lieberman.

19 THE COURT: And he is a lawyer, I gather?

20 MR. BERLIN: He is a lawyer.

21 THE COURT: And was his sort of -- what was his -- did
22 he have an administrative role Cohen Pontani or not?

23 MR. BERLIN: All the partners had some administrative
24 functions, but my understanding is that he was the partner that
25 was most familiar with the record management systems that they

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1 had.

2 THE COURT: And was Cohen Pontoni large enough to have
3 an IT department?

4 MR. BERLIN: They had an IT person. But the questions
5 here are much broader than what that person would know.

6 THE COURT: I mean some of this is very substantive.
7 This is what was --

8 MR. BERLIN: We believe Mr. Lieberman will be able to
9 answer the questions. He has made efforts to get information,
10 as a 30(b)(6) witness normally would do that is not readily in
11 his recollection.

12 THE COURT: Well, that is his job as a 30(b)(6)
13 witness, to learn. I mean like 7 is not a 30(b)(6) document
14 witness. It asks for substance. It's, you know, OK to ask the
15 witness are there, to your knowledge, any documents which were
16 created in connection with the Cohen Pontoni/Cozen O'Connor, I
17 guess, merger, but it's not appropriate to ask what kind of
18 actions did the firm take as they considered joining or being
19 acquired by some other firm. And that's a substantive
20 question; that's not the purpose of this 30(b)(6) deposition.

21 MS. HUNTER: I think number 7 as it's written says
22 "actions taken with respect to CPLP documents and/or ESI".

23 THE COURT: What does that mean, "actions taken with
24 respect to documents"?

25 MS. HUNTER: Again, your Honor, these are just the

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1 topics as we tried to present them. This is not how we're
2 going to exactly word the question. I think the concept is we
3 want to know when you were getting ready to do the merger with
4 Cozen, or you were being involved in the due diligence process,
5 you know, what documents did you gather together to send to
6 Cozen? I think that relates to the documents. I think that --

7 THE COURT: That's a very different question.

8 MS. HUNTER: I think generally the purpose of, and as
9 you stated, of this 30(b)(6) deposition is to figure out what
10 documents existed before, and for that reason we do need to ask
11 some background questions about how documents were kept at the
12 old firm as it existed then, and then what was done with those
13 documents. Were some of them sent to Cozen during the due
14 diligence process and therefore we can get them from Cozen?
15 Were some of them put on servers? Were some of them imported
16 to Cozen? That's what we're trying to find out.

17 THE COURT: But that assumes that you have served a
18 document request on Cozen and Cohen Pontani, and they've hidden
19 documents from you that exist today because they have not given
20 you something; because otherwise whatever category of document
21 you're interested in seeing, you ask for that as a document
22 request.

23 MS. HUNTER: We have done that. We did make -- you
24 know, I think Mr. Berlin is correct -- 70 or 80 document
25 requests. But in written responses I believe to those document

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1 requests, but certainly in conversations with Mr. Berlin, he
2 said I don't think those documents exist anymore; I think they
3 may have been destroyed in the hurricane.

4 As he stated when he stood up before, he doesn't know
5 for sure what does exist. He said that there are 14 servers
6 that were brought over to Cozen. He said himself that he
7 doesn't know what is on them.

8 THE COURT: Well, wait a second. I assume that the
9 hard copy files that still exist, that the computers that still
10 exist or the servers that still exist have been searched. Yes?
11 No?

12 MR. BERLIN: Well, what has been searched is -- I can
13 answer your question, but I also want to correct one statement.
14 I didn't say that these documents have been destroyed, because
15 I don't know what's been destroyed. So I think there is a
16 question. But I just know that I don't have a lot of hard copy
17 documents to search, and I made that clear.

18 But, yes, as we discussed at the last conference,
19 Cozen O'Connor made available to us the e-mails that they
20 imported from the five partners, individual defendants, when
21 those individual defendants joined Cozen O'Connor. They made
22 them available to us. We searched them with the search terms
23 plaintiff gave, and then from the hits I got I, I looked for
24 documents that were responsive to the questions they made. And
25 that is what has been produced, and the supplemental production

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1 we talked about before, we will finish that.

2 And whatever hard copy documents we had, we searched.
3 And I did tell Ms. Hunter that I found a few other documents,
4 and that they will be included in this production -- a few
5 meaning like two -- included in this production. That's it.

6 THE COURT: What about the 14 servers?

7 MR. BERLIN: Well, that's what we talked about at the
8 last hearing. The 14 servers, the estimates I got were that it
9 had four terabytes of data and that it would be -- and I got
10 significant cost for searching it. So we talked about what
11 would be the appropriate thing to search, and we talked about
12 the five individual partners' e-mails, which I was able to
13 access from Cozen O'Connor, and that's what was searched.

14 MR. FRUMKIN: Your Honor, there is --

15 MR. BERLIN: 14 servers are offline; they're just
16 preserved; we have them.

17 MR. FRUMKIN: I just want to bring up one point that
18 led to the 30(b)(6), and that was we made all of these requests
19 in April of last year. We were told all along the way that all
20 the documents were destroyed in Sandy. And we have discussed
21 that.

22 November 3, the day that we came back here last, that
23 morning, I was told that there were e-mails that existed the
24 entire time that the CPLP partners brought with them to Cozen
25 O'Connor. And so when Mr. Berlin says Cozen O'Connor, you

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1 know, he just found this out, I mean his clients knew the whole
2 time that they had access to all of those e-mails. They had
3 to, because they brought them with him.

4 That's when it was discovered. That's why your Honor
5 suggested the 30(b)(6), because we have just gone through eight
6 months of having nothing available to suddenly have them
7 available by Mr. Berlin's client, who knew they were available
8 the whole time, because they obviously were using them; they
9 brought them with them over there.

10 That's the history of this. That's why there are
11 detailed subject matter about what happened to the documents,
12 because we were initially told nothing existed until suddenly
13 they appeared. And we believe they knew the whole time that
14 they had them, because they are the ones using them at Cozen
15 O'Connor. So that's the history of this.

16 MR. BERLIN: So, your Honor, I mean that's not the
17 complete history, and I don't know if I have to rehash what we
18 talked about the last time. But it's not nefarious at all, and
19 it didn't work and operate that way.

20 But he is correct that I never said the e-mails were
21 destroyed. I indicated that we had them on the servers and
22 that I had communicated about the scope and the extent of the
23 information on the servers, and the cost of searching those
24 servers and trying to initiate a dialog with regard to that.

25 I explained all of this last time, and if you don't

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1 want me to do it again, I won't.

2 MR. FRUMKIN: It wasn't until November, Judge. I'm
3 sorry to interrupt. It was in November that we first learned
4 that e-mails existed. I don't know what happened from April to
5 November. Again, whether it was nefarious or not, it's just a
6 fact that that whole gap we had nothing, and we had no answers
7 about anything.

8 MR. BERLIN: Again, I can round out the story and
9 explain it, but the point is the discussion that we had last
10 time is what led your Honor to say why don't you just take a
11 30(b)(6) and find out what happened to the documents. And so
12 my understanding is the purpose of this is to find out what
13 documents existed electronically or otherwise and what happened
14 to them, do they exist anymore or not, and if they exist where
15 are they, and if they don't exist, why not. That's what I
16 thought the purpose was.

17 THE COURT: That sounds right.

18 MR. BERLIN: So we get to the bottom line and then
19 move forward.

20 So, some of these questions go a little bit beyond
21 that. And I appreciate the effort that plaintiff's counsel
22 went into in drafting this, but again a 30(b)(6) is also a
23 little bit different than another deposition. I have to
24 prepare a witness to be able to respond to questions on these
25 topics and that includes, as we just discussed a few moments

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1 ago, him endeavoring to go out and obtain information that he
2 doesn't personally have, that the organization does have, so
3 that he can respond to this.

4 And some of these questions are very broad based,
5 they're loosely drafted. And what I had asked for besides the
6 date range objection, is for a little more precision so that
7 therefore I can properly prepare my witness. That's what I
8 asked for, and that's what the bulk of these objections are
9 about. What do you need to know? Tell me so I can prepare my
10 witness.

11 THE COURT: Well, let me say that it seems to me that
12 we're now talking essentially about a win win, because if the
13 plaintiff is more specific and targeted in sharing what it
14 really is that you are thinking about and want to learn, that
15 increases the likelihood that Mr. Lieberman will know the
16 answer to what it is that you're asking. Because to the extent
17 that it remains vague, then just like the defendant can in
18 writing object, at the deposition the answer is going to be I
19 didn't understand that that is what you meant and, therefore,
20 I'm not prepared to answer that.

21 So I would suggest that the way to cut through this --
22 and I think a great deal of it is resolved by taking out the
23 time period that is in my view overbroad, that some greater
24 clarification on the different requests might be useful -- I
25 really think mutually useful.

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1 I mean the whole point is -- again let's just look at
2 16: Types of documents maintained only in hard copy format and
3 for each type, the custodian, the location where documents were
4 maintained at CPLP and the current location of such documents.

5 I mean what if they are the invoices for the pencils?
6 I mean who cares? And yet it is totally broad enough to be
7 read that way.

8 So, if there is really, you know, something that you
9 really want to know about, why don't you send a clarifying --
10 it could be a letter, it could be an e-mail, it could be
11 another request.

12 MR. FRUMKIN: Your Honor, you know, we would be
13 pleased if it would assist the court and counsel to maybe take
14 another try at this in a sense of looking at the subject
15 matter, narrowing that down and maybe being more specific,
16 which maybe might help move this along, if that will make it
17 work.

18 THE COURT: I mean, look, the whole point is you are
19 fortunate in a sense to have Mr. Frumkin as your client,
20 because he was there.

21 MR. FRUMKIN: Mr. Fazzari.

22 THE COURT: I'm sorry, the Fs guy.

23 MR. FRUMKIN: I would like to be my client at some
24 point, but that's not supposed to be a good idea.

25 THE COURT: All right. Depends on the client is.

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1 But the whole point is he was there. He presumably
2 has a more refined knowledge of what kind of documents they
3 kept, how they operated. But between Mr. Fazzari and you guys,
4 you must know what it is that you really are looking for.

5 I mean what do you think is significant? You really
6 don't care about a whole host of pieces of paper or computer
7 files that exist.

8 I mean tons of this stuff could be -- you know, the
9 Social Security withholding records for the secretarial staff,
10 you couldn't care less about stuff that's there. You will know
11 it's there, but there is something else you're looking for. I
12 know you're not looking for that. I don't know exactly what
13 you are looking for, but if you articulate this, you are going
14 to get a better witness and you are going to be able to move
15 forward more rapidly.

16 You really need to focus. The idea is not the broad
17 request. What are you really looking for? What do you think
18 are your potential smoking guns, you know, the things that are
19 really going to make or break your case? I have no idea, but I
20 do know that if you focus, you will move faster.

21 MR. FRUMKIN: Right. Your Honor, I think -- and maybe
22 it was implicit -- both sides know what the case is about, and
23 both sides know what we're interested in having.

24 THE COURT: You have to write it. You just give him a
25 chance to come in and object. Right?

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1 MR. FAZZARI: Can I say something?

2 THE COURT: I don't know. It depends on whether your
3 attorney will like it.

4 MR. FRUMKIN: Go ahead.

5 MR. FAZZARI: I say this because you just made a
6 reference to it was fortunate to have me because I was there.
7 True, I was there. I don't know how they kept their documents,
8 how they classified them, what they called them. They were
9 very closed about anything.

10 And, as an example, they recently produced what they
11 said was my personnel file, and I went through it, and there
12 are things missing from that. They were supposed to be
13 preserved completely in the personnel file. There is one memo
14 that says that there are three other reviews on file for me.
15 There are no reviews in the personnel file they produced.

16 So, you would expect them to be in the personnel file,
17 but they're not. So they're either in another file or this is
18 not a complete file. And it could be that they were keeping
19 review files as separate from personnel files, but I don't know
20 what they would call them.

21 THE COURT: OK. Well, but there is --

22 MR. FAZZARI: And that's the problem we're facing; we
23 don't know what they call a particular file.

24 THE COURT: But you don't need to know what the name
25 of it is.

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1 MR. FAZZARI: That's why it's topical, your Honor.

2 THE COURT: You know, it's easy enough I think to ask
3 for all records of Mr. Fazzari's employment including but not
4 limited to --

5 MS. HUNTER: We did.

6 THE COURT: -- whatever. And whether -- and it
7 wouldn't be inappropriate to have a 30(b)(6) witness, you know,
8 to ask the question -- you know, your production has not
9 included performance reviews; there is an indication of the
10 existence of those reviews. You know, can you explain it, why
11 they don't exist? I mean do you believe they exist? If so,
12 why haven't they been produced? Do you believe they were
13 destroyed? Can you explain it?

14 MR. FRUMKIN: Your Honor, we did make that request,
15 and I was hoping when we get the rest of the documents that may
16 be in another file and would be produced before we went into
17 this battle of what happened to them.

18 But I guess ultimately the point is if it would make
19 it easier, we can specify the categories. I believe Mr. Berlin
20 is aware of the relevant categories in the case, but we could
21 specify that and maybe try to work this out to this extent
22 rather than using the court's time.

23 One issue though, I think the court did speak to this,
24 that in each objection it talks, it says CPLP will produce
25 Lance Lieberman to testify regarding the subject matter to the

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1 extent he has knowledge of responsive information. It
2 shouldn't really be to the extent he has knowledge. He is
3 either supposed to learn the knowledge or someone else who has
4 the knowledge should also be produced.

5 THE COURT: Well, I think --

6 MR. FRUMKIN: So I don't want to get involved in that
7 later.

8 THE COURT: Look, there is no question the 30(b)(6)
9 witness is supposed to educate himself to respond, but I think
10 that, you know, until the categories are more precisely
11 delineated, it's going to be hard to either prepare and hold
12 him responsible for lack of ability to respond.

13 So, truly I'm not offering this suggestion simply to
14 either get out of work myself or to put my thumb on the scale
15 of either side here. It is truly a win/win. The more precise
16 the question, the more the 30(b)(6) can get educated, and the
17 more likely there is to be some consequence of his failure to
18 be educated on something. It just makes it a better event.

19 So, since you guys say you do know what each of you
20 are looking for, it's not a secret. I mean if you tell them
21 what you're looking for, it's not going to give away the case.
22 You know, you may want a document that is a smoking gun, but we
23 all know exactly what kind of document that smoking gun would
24 look like, right?

25 MR. FRUMKIN: Correct, your Honor. I think we can

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1 probably work together on that.

2 THE COURT: OK. Is there anything else we need to
3 talk about today?

4 MR. BERLIN: Not from us.

5 MR. FRUMKIN: I don't believe so.

6 THE COURT: OK, thanks.

7 MR. BERLIN: Thank you, your Honor.

8 (Adjourned)